APPENDIX A.

LETTER CONTAINING ALLEGED ASSIGNMENT.

November 7, 1935.

S. A. SCOTTI & CO., MONZA, ITALY.
AMERICAN SCOTTI CORP., NEW YORK, N. Y.

Gentlemen:

In reference to contract dated November 30th, 1932, and cables exchanged since then in relation to this contract, we hereby agree that we are paying you, and specifically, per your cable dated November 6th, direct to Mr. B. Scarpa instead of American Scotti Corporation, the sum of Ten Thousand Dollars ($10,000.)

It is understood that with this payment of Ten Thousand Dollars ($10,000), S. A. Scotti & Company and American Scotti Corporation are paid in full for all Felts which they have had in the United States. It is understood that we release them from further obligations to us, and that they release us in full.

Likewise, it is understood that, in reference to duties, any refunds accruing on all Felts imported by American Scotti Corporation, or ourselves for account of American Scotti Corporation or for account of S. A. Scotti & Company of Monza, are for account of Henry Pollak, Inc., and that, likewise, any additional duties that may be imposed are for account of Henry Pollak, Inc.

The above agreement is considered as a complete General Release on the foregoing basis, and in consideration of the foregoing and in full payment, our check for Ten Thousand Dollars ($10,000) is being made out to Mr. B. Scarpa.

This agreement has no bearing on any Straw goods we may be holding for American Scotti Corporation.

Very truly yours,

HENRY POLLAK, INC.
By: (Signed) MAURICE POLLAK

MP:RD

AGREED TO, FOR AMERICAN SCOTTI CORPORATION

(Signed) B. Scarpa
Secretary

AGREED TO, FOR S. A. SCOTTI & Co. MONZA, ITALY.

(Signed) B. Scarpa
Special Representative

APPENDIX B.

Opinion of Justice Denying Petitioners' Motion for Judgment on the Pleadings.

This motion is made by plaintiffs and seeks judgment on the pleadings. The action is, nominally, to reform a certain agreement entered into between the plaintiffs and the defendant on November 7, 1935. For several years prior thereto defendant had represented plaintiffs as American agent in the sale of felts manufactured or marketed by the plaintiffs. In 1935 plaintiffs sold their American stock of merchandise to defendant under an agreement which included the following in one of its paragraphs: "Likewise, it is understood that, in reference to duties, any refunds accruing on all Felts imported by American Scotti Corporation or ourselves (meaning the defendant Henry Pollak, Inc.) for account of American Scotti Corporation, or for account of S. A. Scotti & Company of Monza, are for account of Henry Pollak, Inc. and that, likewise, any additional duties that may be imposed are for account of Henry Pollak, Inc." In consideration of the agreement defendant paid the sum of $10,000 to the plaintiffs, after increasing a lower offer which it had previously made of about $7,000.

On July 22, 1938, plaintiffs instituted an action against the defendant which, nominally, sought to reform the contract by eliminating the provision as to refunds of custom duties belonging to defendant. The complaint alleges that the agreement as to transfers of the refunds was executed by plaintiff as a result of claimed misrepresentation, fraud on the part of defendant and ignorance and mistake on the part of plaintiff. Among the defenses, apart from denials, are those of ratification and estoppel.

On no theory can there be a judgment on the pleadings in favor of plaintiffs. The most the latter can require is

a striking out of the separate defenses dealing with ratification, estoppel and laches, on the ground that under no circumstances can an assignment of a claim for refunds of duty be upheld. Under plaintiffs' theory, no ratification on the part of plaintiffs could make good something which is absolutely forbidden by law, namely, an assignment to another of claims against the United States. Consequently, the motion must be treated as tantamount to one for a declaratory judgment to the effect that in so far as the agreement between the parties purports to transfer the claims against the United States for refunds, the provision is absolutely null and void. If this is to be the construction, then it would not matter that there had been ratification, laches or estoppel. The agreement as to such assignment would nevertheless be null and void. While plaintiffs may not have judgment on the pleadings, if their contention as to the invalidity of the assignment is correct, they may obtain partial relief in the way of a striking from the answer the separate defenses dealing with ratification and estoppel. The crucial contention in this motion is as to the effect of Section 3477 of the Revised Statutes of the United States, reading as follows: "All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein whether absolute or conditional, and whatever may be the consideration, therefor, and all powers of attorney, orders or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments and powers of attorney must recite the warrant for payment, and must be acknowledged by the person making them before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer, and it must appear by the certificate that the officer at

the time of the acknowledgment read and fully explained the transfer, assignment or warrant of attorney to the person acknowledging the same."

It is evident from a reading of the paragraph of the contract upon which defendant's claim to refunds is based, that the assignment therein contained was entirely informal. Under these circumstances is the statute just quoted to be construed so as to make absolutely void the informal provision of the contract between the parties as to the assignment of claims for refund? Any doubt which may exist on this point has been definitely disposed of by the Supreme Court of the United States in *Martin* v. *National Surety Co.* (300 U. S. 588). Previous to that decision there was a line of cases such as *National Bank* v. *Downie* (218 U. S. 345), which supported plaintiffs' contention. As stated by Mr. Justice Cardozo in the *Martin* case (*supra*), another line of cases exhibited an opposing tendency referring to *Lay* v. *Lay* (284 U. S. 24) and a number of other cases cited, including *York* v. *Conde* (147 N. Y. 486). As to this second line, the learned justice said: "These cases teach us that the statute must be interpreted in the light of its purpose to give protection to the Government. After payments have been collected and are in the hands of the contractor or subsequent payees with notice, assignments may be heeded, at all events in equity, if they will not frustrate the ends to which the prohibition was directed. * * * To the extent that the two lines of cases are in conflict, the second must be held to be supported by the better reason. Many an analogy from fields uncovered by the statute reinforces that conclusion. An assignment ineffective at law may none the less amount to the creation of an equitable lien when the subject matter of the assignment has been reduced to possession and is in the hands of the assignor or of persons claiming under him with notice."

If there is any doubt that full protection of the rights of the Government in the instant situation exists, it is

fully disposed of by the previous appointment by Mr. Justice McLaughlin of a receiver of the prospective funds in suit herein, and the injunction restraining plaintiffs from collecting, assigning or otherwise disposing of the aforesaid claims for customs refunds on wool felt hat bodies. This receivership was allowed upon the application of the defendant. It was thus recognized by the court that collection by the receiver of any refunds would be a complete exoneration of any claims against the Government. Further litigation between the parties as to the respective rights to such refunds would proceed after the analogy of an interpleader. The contention by the plaintiffs of the absolute invalidity of the assignment must therefore be overruled and defendant permitted to litigate its affirmative defenses on the merits.

The motion for judgment on the pleadings is denied. Order signed.

APPENDIX C.

OPINION OF TRIAL JUSTICE.

The agreement upon which this cause proceeds attempted to effect an assignment of any accruing refunds of certain import duties paid under protest to the United States Government. It is contained in the agreement of November 7, 1935, and by this action plaintiff seeks to eliminate therefrom the provision effecting the assignment upon the ground that it is in violation of Section 3477 of the Revised Statutes of the United States and is thus null and void; that in the making of the contract defendant was guilty of fraud and misrepresentation; and that it should be reformed for the reason that it is ambiguous and did not express the true intent of the parties.

Heretofore, plaintiffs moved for judgment on the pleadings and the motion was denied upon the authority of *Martin* v. *National Surety Co.* (300 U. S. 588). The Special Term declared that by reason of the appointment of a receiver with authority to prosecute and collect the claims for refund in suit, and the restraint against the parties to pursue such claims, the assignment was not null and void for all purposes under that statute. On the contrary, the action became one in the nature of an interpleader and the court could adjudicate the equities between the parties without frustrating the purpose of the statute. Upon appeal the determination was affirmed (259 App. Div. 878).

Moreover, at the time of the trial the United States Goverment was absolved of all liability and had voluntarily made full payment to the receiver of all the refund claims in suit as to which any question might have been raised under Section 3477. Thus, this portion of the *res* was actually in *custodia legis* at and before the trial,

discharged of any interest of the Government in it, and subject to disposition by this court as the equities may require. For this further reason the plaintiffs' contentions under Section 3477 are without merit.

Unless, therefore, the claim of fraud and misrepresentation or of ambiguity is sustained the defendant must prevail. In this connection it is clear from the proof that the agreement was made on behalf of plaintiffs by their authorized agent with full knowledge of the facts and of the entire situation as it then existed with respect to the type of import duty here involved and at a time when plaintiffs found it both necessary and advantageous to conclude it. The event proved, however, that the assigned asset, deemed of doubtful value, suddenly and unexpectedly assumed great value when the Court of Customs and Patent Appeals reversed the Customs Court and sustained the protest made in another and similar case. In connection with the claim for reformation there is no ambiguity in the agreement and the proof shows that it correctly expressed the intent of the parties.

Since this view of the issues is sufficient to defeat plaintiff's claim, it is unnecessary to give further consideration to the separate defenses. In any event the proof did sustain them. Defendant is entitled to recover upon its counterclaim which seeks a declaration of the respective rights of the parties and incidental relief.

The funds in dispute are the property of the defendant and must be turned over to it.

The proposed findings have been passed upon.

Let the prevailing party submit decision and decree accordingly.

Dated, July 2d, 1942.

A. L.,
J. S. C.